Supreme Court, U.S.
F I L E D
OCT 14 1997
CLERK

No. 97-444

In the
Supreme Court of the United States
October Term, 1997

Cargill Communications, Inc.,
a Minnesota corporation,

Petitioner,

vs.

Annie Miners,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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**Counsel of Record*

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26 pp

PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding.

QUESTION PRESENTED FOR REVIEW

Whether sufficient genuine issues of material fact remain to be decided by the jury which preclude a decision at this time that Defendant is entitled to judgment as a matter of law.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Annie Miners requests that the Court deny the Petition of Cargill Communications, Inc. ("Cargill") for Writ of Certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit in the matter of Annie Miners v. Cargill Communications, Inc., reported at 113 F.3d 820 (8th Cir. 1997) and reproduced at Appendix A to the Petition ("Pet. App. A").

I. STATEMENT OF THE CASE

A. Introduction

Petitioner employed Respondent as a Promotions Director from February 1994 until June 9, 1994 pursuant to a written employment contract. Petitioner terminated Respondent's employment when she refused to enter and complete a 30-day in-patient treatment program for treatment of alcoholism. Respondent denies she is an alcoholic and brought an action against Respondent alleging violations of the Americans with Disabilities Act ("ADA") and the Minnesota Human Rights Act ("MHRA"); breach of contract and defamation. The District Court granted Respondent's motion for summary judgment on the ADA claim and dismissed the State law claims without prejudice. The Eighth Circuit reversed the District Court and remanded the matter for trial.

The Eighth Circuit found that the District Court had improperly granted summary judgment because Respondent had presented sufficient evidence to establish a prima facie case under the ADA and from which a reasonable jury could conclude that Petitioner terminated her for a perceived disability in violation of the ADA.

Petitioner's contention is that the Eighth Circuit ignored Supreme Court precedent and implemented a conflicting interpretation of the *McDonnell Douglas* paradigm when it reversed the District Court's grant of summary judgment in this matter. As set forth below, there is no cause for this Court's review of the Eighth Circuit's decision as it did not ignore Supreme Court precedent nor did it implement a conflicting interpretation of the *McDonnell Douglas* paradigm.

B. Correction of Misstatements in the Petition

Petitioner asserts that it had a policy which prohibited employees from drinking even one drink and driving company vehicles. The existence of this policy is a material fact in dispute. The Petitioner's written alcohol policy did not contain any provisions regarding drinking and driving company vehicles. (Respondent's App. 1) The policy at issue was an oral policy, allegedly disseminated at managerial meetings. Respondent was not informed of this policy. There is evidence that both the general manager and the president of Petitioner had consumed alcohol and driven company vehicles without repercussion of any kind, calling into question the very existence of such a policy. Throughout the Petition, Petitioner refers to Respondent's alcohol related misconduct. (Petition - 10, 19 20-21). If no oral alcohol policy existed, Respondent committed no misconduct by drinking alcohol and then driving her company vehicle.

Petitioner placed Respondent under surveillance after working hours to determine if she was consuming alcohol and driving her company vehicle. On the evening of June 8, 1994 Respondent's supervisor seized her car keys after surveillance reported that she had been observed drinking after work until the bars closed. Respondent admits she had five alcoholic

beverages in a six hour period. She also consumed water and food during that time. As a result, Respondent had a blood alcohol content of zero at the time she entered the vehicle to drive home. (Respondent's App. 2)

The following morning Respondent was ordered, without the benefit of any evaluation or medical opinion, to complete a 30 day in-patient treatment program for alcoholism at Hazelden or be fired. One question for the jury will be whether or not she was terminated because she drove a company vehicle with a blood alcohol level of zero or because she was perceived by Petitioner to be an alcoholic. Evidence of Petitioner's mandate that she complete the 30 day in-patient treatment program at Hazelden is evidence that Petitioner perceived Respondent to be an alcoholic. The Eighth Circuit's decision gives Respondent a chance to present the case on its merits to a jury for its determination of whether she was terminated because Petitioner perceived her to be an alcoholic in violation of the ADA.

Petitioner argues that because in the particular factual circumstances of this case the Eighth Circuit concluded that the Petitioner's demand that Respondent attend a 30 day in-patient treatment program for alcoholism could be used as evidence that Petitioner regarded Respondent as an alcoholic, this Court should use this case to evaluate whether the purposes of the ADA would be thwarted by allowing such evidence before a jury. Petitioner labels its demand for inpatient treatment as an "offer of treatment" within the ADA and seeks a broad ruling from this Court that no offer of treatment may be used as evidence of discrimination under the ADA.

Under the facts of this case, there was no "offer of treatment" within the ADA because Respondent is not disabled. She did not make a request for treatment as an accommodation and in fact suggested to Petitioner that if

Petitioner thought she had a problem with alcohol an evaluation would be more appropriate than thirty day in-patient treatment. Petitioner rejected her request. From these facts, a jury could conclude that Petitioner perceived Respondent as an alcoholic in need of in-patient treatment. Respondent respectfully suggests that this case is not the appropriate case to re-examine the ADA as it falls squarely within the existing rubric of analysis. It is also not the appropriate case to make broad rules regarding "offer of treatment" issues since it is a perceived disability case, not an actual disability case. The Eighth Circuit's decision sends no confusing message to employers as it is entirely consistent with the ADA itself which requires "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual . . . " (emphasis added) 42 U.S.C. 12112 (A) (Petitioner's App. 37)

II. REASONS FOR DENYING THE WRIT

A. THE CASE IS CURRENTLY BEFORE THIS COURT UPON AN INADEQUATE RECORD, AND IT IS PREMATURE FOR THIS COURT TO HEAR IT.

The Eighth Circuit followed settled law in reviewing the District Court's grant of summary judgment. There is no error for this Court to address. As there has been no trial, this case is before this Court on affidavits, documents and deposition testimony. Petitioner is really asking this Court to engage in fact-finding and inference drawing to reverse the Eighth Circuits' reversal and remand for trial. Respondent respectfully suggests that a jury be allowed to find the facts and draw the inferences. Until that is done, a meaningful

review of the application of the law to those facts cannot be conducted.

B. THERE IS NO SPLIT AMONG THE CIRCUITS AS SUGGESTED BY PETITIONER.

Respondent presented evidence that other employees had violated the alleged oral alcohol policy without discipline of any kind to show that there was no such policy. Only Respondent, the president, and the general manager of Petitioner had company vehicles. Petitioner alleges the policy was intended to protect the company from tort liability that could arise from employees drinking alcohol and driving company vehicles. This explanation suggests that since tort liability could arise whether the employee/driver was the president or the janitor, such a policy, if it existed, would be enforced against her alone without any plausible explanation by Petitioner as to why others were not disciplined for exposing the company to tort liability.

Petitioner argues that the Eighth Circuit's analysis regarding the comparison of Respondent to other Petitioner employees is contrary to this Court's decision in *McDonnell Douglas* and in conflict with other circuit courts. This argument is patently unsupported by the Eighth Circuit's decision. *McDonnell Douglas* sets forth the standard for disparate treatment analysis under a discrimination claim. Under the ADA, an employee need not present evidence of disparate impact to show discrimination. See 42 U.S.C. §12111 (no requirement that an employee must show disparate impact).

Under the factual circumstances of this case, the Eighth Circuit's analysis of the evidence regarding comparisons between employees does not conflict with the *McDonnell Douglas* paradigm. See McDonnell Douglas Corp. 411 U.S.

at 802, n.13 (proof required to establish a prima facie case of discrimination will necessarily vary in different factual situations). It does not establish an interpretation of *McDonnell Douglas* contrary to any other circuit.

C. PUBLIC POLICY FAVORS DENYING THE WRIT.

Petitioner is correct when it states that the purpose of the ADA is to eliminate discrimination against those with disabilities and discourage the stereotyping of people suffering from disabilities within the work force. However, people who are not disabled, but are perceived to be disabled, are also protected by the plain language of the ADA. Respondent never asserted that she was an alcoholic or that she was suffering from any disability. When Petitioner raised the issue, Respondent offered to be evaluated rather than go to in-patient treatment. Petitioner wanted her to enter and complete a 30 day in-patient treatment program for alcoholism regardless of her contention that she was not disabled. Petitioner based its perceptions on the very fears, myths, and stereotypes the ADA was intended to ameliorate. Petitioner terminated Respondent when she refused to enter and complete the program. Assuming the facts in favor of Respondent, that she was not an alcoholic, Petitioner's mandate that she complete a 30 day in-patient treatment program amounted to a sentence and subsequently, an admission that she was something she was not, i.e. an alcoholic. This is precisely the reason the ADA protects those perceived to be disabled as well. The Eighth Circuit's decision is in harmony with this public policy and therefore the Petition for a Writ of Certiorari should be denied.

III. CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for the Writ of Certiorari be denied.

Respectfully submitted,

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Counsel of Record
George E. Antrim, III
Jean E. Boos

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Counsel for Respondent

May 2, 1994

To: **All Staff**

From: John Kuehne

Re: Alcohol use at remote broadcasts/company events

A while back we discussed Company policy regarding alcohol use during regular working hours and at remote broadcasts/company events. With all of the staff we have added since then and with all of the upcoming activity we have scheduled I thought this would be a good time to revisit and clarify the policy.

Alcohol use during normal working hours (i.e. 8am to 5pm) is against Company policy and is grounds for immediate termination. If you are at a Company sponsored event such as a remote broadcast and you are working at the event the use of alcohol is against Company policy and is grounds for immediate termination. If you are not scheduled to work at the event but are going on your own time to support the Company than good judgment is to be applied to the use of alcohol. Remember, even though you may not be working at the event you still represent the Company and are expected to conduct yourself accordingly. Excessive use of alcohol by anyone (working or not) at company sponsored event will be grounds for immediate termination.

Use of Alcohol is allowed in entertainment situations as long as they occur after regular business hours and the same rules regarding good judgment noted above are applied. Again, excessive use of alcohol in these situations will be grounds for immediate termination.

This should clarify Company policy on alcohol use. Please be sure to see me if you have any questions or concerns.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MINNESOTA

THIRD DIVISION

Annie Miners,

Plaintiff,

v.

FEDERAL RULE OF CIVIL PROCEDURE 26(a)(2)(B) DISCLOSURE REPORT OF ANNE RUMMEL MANLY

Cargill Communications, Inc.,

Defendant.

STATE OF MINNESOTA)
)
COUNTY OF HENNEPIN)

ANNE RUMMEL MANLY, being first duly sworn, states and deposes under oath as follows:

1. I am a consultant working with Forensic Associates, Inc., 4690 IDS Center, 80 South Eighth Street, Minneapolis, Minnesota 55402. I have a Bachelor of Arts degree in biology and chemistry from Anderson University, Anderson Indiana. I have also taken further courses at Indiana University Medical Center. I have worked for almost nine years for the Indiana

State Dept. of Toxicology and the Indiana State Police, and for over seventeen years in the Forensic Science Laboratory at the Minnesota Bureau of Criminal Apprehension, working in the Drug Chemistry, Toxicology and Alcohol Sections of the laboratory. I have attached hereto as Exhibit "A" a copy of my curriculum vitae.

2. As of this date, I have received a $600.00 retainer to be applied toward my time spent working on this case. My time is billed at $175.00 per hour. I have worked approximately 6.5 hours on this case at this point and I anticipate a minimum of an additional four hours if my testimony is needed at trial. Deposition testimony prior to trial might eliminate my time needed for trial or add to it.

3. Attached thereto as Exhibit "B" is a list of cases I have testified in over the past four years.

4. In the instant proceeding, I may offer the following opinions based on my background, training, expertise and education:

   a. A person like Annie Miners would not have been intoxicated or impaired at 1:45-2:00 AM on June 9, 1994 when driving out of the parking ramp.

   b. A person like Annie Miners would have had an alcohol concentration of zero at the time she was driving out of the parking ramp.

5. The above opinions are based on my background, training, expertise and education plus scientific knowledge of the absorption, distribution and

elimination of alcohol in addition to the testimony offered concerning the subject's sex, weight, number of drinks consumed, concentration of alcohol, timing of drinks consumed and food consumed.

6. The material reviewed and considered included depositions of Annie Miners taken on May 16, 1995 and September 19, 1995. A deposition taken of Dan Seman on December 12, 1995 was also reviewed.

7. At this time, I do not intend to use any exhibits.

/s/
Anne Rummel Manly

Sworn to and subscribed before me
this 31st day of January, 1996.

s/Rebecca J. Helland
Notary Public

FORENSIC ASSOCIATES, INC.
CONSULTING AND LABORATORY SERVICES
4690 IDS CENTER • 80 SOUTH EIGHTH STREET
• MINNEAPOLIS, MINNESOTA 55402-2207

Richard E. Jensen, Ph.D.
Anne Rummel Manly, B.A.
Mary Catherine McMurray, B.S.

(612) 339-7903
Fax (612) 349-6777

EXHIBIT "A"

ANNE RUMMEL MANLY, B.A.

EDUCATION:

Bachelor of Arts
1967 - Biology/Chemistry
Anderson University
Anderson, Indiana

Postgraduate Work
Indiana University Medical Center
1968-1972 - Toxicology
and Chemistry
Indiana/Purdue University
Indianapolis, Indiana

PROFESSIONAL EXPERIENCE:

1992 FORENSIC ASSOCIATES, INC., Minneapolis, Minnesota

Consultant in the areas of forensic analysis for ethyl alcohol and other drugs in blood, urine and breath and the interpretation of such analyses. Provides laboratory, consulting and expert testimony services in alcohol

testing, toxicology, forensic science and scientific literature searches for both civil and criminal cases.

1985 - 1992 Forensic Science Laboratory, Bureau of Criminal Apprehension
St. Paul, Minnesota

Forensic scientist in the Toxicology Group. Responsible for the quantitative analysis of biological specimens for alcohol and other drugs. Provided expert testimony and consultation to both the prosecution and defense. Provided instruction on the topic of alcohol absorption, distribution and elimination in the State of Minnesota Breath Testing Certification courses for peace officers. Provided instruction and training in the areas of toxicological analysis and interpretation.

1980 - 1985 Forensic Science Laboratory, Bureau of Criminal Apprehension
St. Paul, Minnesota

Supervisor of the Alcohol Section. Responsible for the technical excellence and quality control system in the analysis for alcohols in biological specimens. Directed the analytical efforts of all alcohol analysts. Participated in human subject testing as to the effects of ethyl alcohol and the determination of the simultaneous levels of alcohol in blood, breath and urine. Provided expert testimony, consultation and instruction in details of technical procedures, quality control and the interpretation of the analytical results.

1975 - 1980 Forensic Science Laboratory, Bureau of Criminal Apprehension,
St. Paul, Minnesota

Forensic scientist in the Drug Chemistry Section. Responsible for the analysis of samples for presence of both illegal and legal drugs. Provided expert testimony, consultation, instruction and training in details of technical procedures, quality control and the interpretation of the analytical results.

1969 - 1975 Crime Laboratory, Indiana State Police, Indianapolis, Indiana

Responsible for the technical excellence and quality control of analytical procedures in the areas of alcohol and drug chemistry analysis. Provided expert testimony, consultation, instruction and training in details of technical procedures, quality control and the interpretation of analytical results. Provided instruction for Breathalyzer training courses for law enforcement officers. Participated in human subject testing as to the effects of ethyl alcohol.

1967 - 1969 Department of Toxicology, Indiana University Medical Center Indianapolis, Indiana

Responsible for analysis of biological specimens in both forensic and clinical toxicology cases. Provided instruction in laboratory procedures to toxicology graduate students. Provided instruction for the Breathalyzer training courses for law enforcement officers. Participated in human subject testing as to the effects of ethyl alcohol and various other drugs. Provided expert testimony and consultation in details of analytical procedures and the interpretation of the results.

PROFESSIONAL AND LEARNED SOCIETIES:

American Academy of Forensic Sciences
- Fellow/Criminalistics Section
- Chair/Education Committee
- Member/Planning Committee; Finance Committee

Midwestern Association of Forensic Scientists
- President; President-Elect; Past-President; Secretary
- Chair/Planning Committee; Ethics Committee
- Member/Research Committee; Audit Committee; Ethics Committee

International Narcotic Enforcement Officers Association

EXHIBIT "B"

TESTIMONY LIST OF ANNE R. MANLY

State of FL v. Knuth
State of WI v. Ball
State of WI v. Hampton
State of MN v. Holm
State of MN v. Kielmeyer
State of MN v. Braun
State of IA v. Carson
State of MN v. Tschida
State of MN v. Thorfinnson
State of MN v. Walker
State of MN v. Liephardt
State of MN v. Thompson
State of MN v. Haggerty
State of MN v. Gibson
State of WI v. Wypiszenski
State of MN v. Peik
State of MN v. Nachreiner
Brookshire v. S&D Coffee
State of MN v. Abbott
State of MN v. Davis
State of MN v. Dalbeck
State of MN v. Thies
State of MN v. Snelson
State of MO v. Pfautch
State of MN v. Hemshrot
Kvalevog v. Baker, Nowels and Papa Gene's
State of MN v. Giersdorf
State of MN v. Krabbenhoft
State of MN v. Bestick
State of WI v. Alsdurf
State of MN v. Ellis

State of MN v. Schwarze
Huisman v. Lasart
State of WA v. Orcutt
State of MN v. Rosenberger
State of MN v. Roskop
State of MN v. Wynn
State of MN v. Larsen
State of MN v. Laughlin
State of WI v. Bauer
State of MN v. Bradburn
State of MN v. Sterling
State of MN v. Bashaw
State of WI v. Polczynski
Cloud v. Devitt
State of WI v. Taylor
State of MN v. McKnight
State of MN v. Midtbruger
State of WI v. Smalley
State of MN v. Tyndale
State of MN v. MacMillan
State of MN v. Wilson
State of MN v. Cronin
State of MN v. Jensen
State of MN v. Norgard
State of FL v. Haunsteter
State of MN v. Yannarelly
State of MN v. Olson
State of MN v. Gruetzmacher
Montelong v. N.L. Industries
State of WI v. Rekowski
State of MN v. Pengman
State of WI v. Fitzgerald
State of MN v. Opsahl
State of MN v. Crowe
State of WI v. Bakken

State of MN v. Ellsorth
State of WI v. Goethel
State of MN v. Amato
State of MN v. Herbert
State of MN v. Signandels
State of WI v. Markannen
State of MN v. Peik
State of MN v. Gronseth
State of MN v. Schumann
State of MN v. Meyer
State of WI v. Brenner
State of MN v. Beamon
State of MN v. Wilcox
State of MN v. Chaklos
State of MN v. Sheridan
State of FL v. Russo
State of FL v. Ipser
State of MN v. Boyd
State of MN v. Wall
State of MN v. Siem
State of MN v. Mills
State of MN v. Wehrer
State of MN v. Rodvik
State of MN v. Harkness
State of MN v. Logelin
State of FL v. Harmon
State of NE v. Hahn
State of MN v. Holmberg
State of MN v. Peterson
State of MN v. Cavelieri
State of MN v. Petrich
State of MN v. Turner
State of MN v. Van Dusen
State of WI v. Rothbauer
State of MN v. Strong

State of MN v. Laughlin
State of MN v. Milner
State of MN v. Olson
State of MN v. Magee
State of MN v. Mitchell
State of MN v. Pollack
State of WI v. Kinslow
State of MN v. Pawlak
State of MN v. Strong
State of MN v. Teich
State of MN v. Skillings
State of WI v. Suchla
State of WI v. Donner
State of WI v. Rager
State of ND v. Austin
State of MN v. Neubauer
State of MN v. Netland
State of FL v. Milner
State of MN v. Healy
State of MN v. Hable
State of MN v. Nichols
State of WI v. Wathke
State of MN v. Hippert
Scoles v. Anderson
State of MN v. Wellman
State of MN v. Bents
State of MN v. Fitterer
State of MN v. Krengel
State of MN v. Wax
State of MN v. Holzer
State of MN v. Dilworth
State of MN v. Studer
State of MN v. Rivard
State of NY v. Himber
State of MN v. Higmar

State of MN v. Shapiro
State of MN v. Hansen
State of MN v. Baumann
State of MN v. Carlson
State of MN v. Karlsrud
State of MN v. Sands
State of FL v. Hill
State of MN v. Carlson